Supreme Court, U.S.
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No. 94-870

In The

Supreme Court of the United States

October Term, 1994

RAFAEL GARCIA,

Petitioner,

v.

CITY OF CHICAGO; JACK O'MALLEY, STATE'S ATTORNEY OF COOK COUNTY; MICHAEL F. SHEAHAN, SHERIFF OF COOK COUNTY; and C. RICHARD ENGLISH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RAFAEL GARCIA,	)	
Plaintiff,	)	
v.	)	No. 91 C 5535
CITY OF CHICAGO, et. al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Rafael Garcia alleges that excessive force was used in arresting him. He further alleges that he was held in custody for approximately one month without being brought before a judge or magistrate for a probable cause hearing. Named as defendants are the City of Chicago; Chicago police officer Anna Gall; the Cook County State's Attorney Jack O'Malley; the Cook County Sheriff Michael Sheahan; the Cook County Department of Corrections; and then-acting Executive Director of Cook County Jail C. Richard English. O'Malley and the Department of Corrections have moved to dismiss the claims against him. The City and Gall have moved to dismiss certain of the claims made against them.

On a motion to dismiss, all the well-pleaded allegations of the complaint are assumed to be true and all reasonable inferences from the facts alleged are drawn in favor of plaintiff. *Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1039 (7th Cir. 1987). Facts that can be taken by judicial notice can also be considered. *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir.

1986); C.A. Wright & A. Miller, *Federal Practice & Procedure* § 1363 at 464-65 (2d ed. 1990). *See also Gomez*, 811 F.2d at 1039 (*dictum*); *Robinson v. McMahon*, 1990 WL 17174 at *2 (N.D. Ill. Oct. 31, 1990) (*dictum*). To the extent the judicially noticed facts contradict allegations of the complaint, the allegations will not be accepted as true. Wright & Miller, § 1363 at 464. Also, judicial notice can be taken of public records without converting a motion to dismiss to one for summary judgment. *Mack*, 798 F.2d at 1282.

Here, defendants provide a copy of the court records which they contend show that a hearing was held on March 16, 1991, the day after plaintiff's arrest, at which it was determined that there was probable cause to detain plaintiff. Plaintiff's attorney also provides an affidavit in which he represents that true copies of official court documents are attached. Plaintiff does not dispute that the entry for March 16 ("FPCTD D 10,000 BR. 57 3/18/91") means "finding probable cause to detain" with bond set at $10,000 and a hearing set for March 18 in Branch 57 of the court. Accepting this as true would only supplement the allegations of the complaint, not contradict the allegations. In the First Amended Complaint, plaintiff is careful to allege that plaintiff himself was never brought before a judge nor present in court when any charges were presented. While he does not expressly allege that a hearing was held without him present, he also does not expressly allege that no hearing whatsoever was held.[1] This court will take judicial notice that a court

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[1] Defendants seek sanctions pursuant to Fed. R. Civ. P. 11 on the ground that plaintiff's attorney should have examined

finding of probable cause was entered. No notice is taken as to what, if any, type of hearing was held in that the court documents provided do not indicate the nature or extend of any hearing.

Defendant Cook County Department of Corrections argues that it does not have any separate legal existence independent and distinct from the Sheriff of Cook County. *See Mayes v. Elrod*, 470 F. Supp. 1188, 1192 (N.D. Ill. 1979). *See also Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 2167 (1990). Plaintiff makes no argument to the contrary. The Sheriff in his official capacity will be substituted for the Department as a defendant in counts 6 and 8. The Department will be dismissed from Count 11 in that the Sheriff is already a named defendant in that count.

The Cook County State's Attorney is named as a defendant in counts 9 and 11. Since O'Malley's title is mentioned each time he is named and since no personal knowledge or involvement on his part is alleged, the complaint is construed as being against O'Malley in his official capacity only. Since plaintiff has already been released from jail, plaintiff can only be seeking retrospective monetary relief. The State's Attorney, however, is a state official not a local official. Thus, plaintiff's claims against the State's Attorney brought in this court are barred by the Eleventh Amendment. *Houston v. Cook County*, 758 F. Supp. 1225 (N.D. Ill. 1990); *Taylor v. Partee*,

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the state court file to discover that a hearing had been held. However, since it is not alleged in the First Amended Complaint that no hearing was held, this is not a basis for sanctioning the attorney.

1991 WL 136015 at *2 (N.D. Ill. July 17, 1991). The claims against O'Malley will be dismissed.

Anna Gall is named as a defendant in counts 1, 3, 4 and 5. The City of Chicago is named as a defendant in counts 3, 4, 5, 7 and 11. These defendants move to dismiss all the claims against them except the Count 3 state law assault and battery claims.

Count 1 contains all of plaintiff's general allegations that are subsequently reincorporated into the other counts. As to Gall, however, it is only alleged that she arrested plaintiff will acting under color of law and that her striking him "with her flashlight while the Plaintiff was handcuffed wrist to wrist behind his back constituted an excessive use of force which amounted to objectively unreasonable conduct under the circumstance." It is further stated that this "objectively unreasonable conduct" was a violation of the Fourth and Fourteenth Amendment and that it caused plaintiff injury. Gall contends that plaintiff has not adequately identified which clause of the Fourteenth Amendment he is suing under. Legal labels, however, are not controlling; it is the facts alleged that are controlling. *See Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984); *Home Savings of America, F.A. v. The Inland Group, Inc.*, No. 91 C 4181 at 18 (N.D. Ill. Dec. 3, 1991). It is clear from the facts alleged that plaintiff is alleging an excessive force claim which is cognizable under § 1983 and governed by a Fourth Amendment objective reasonableness standard. *See Graham v. Connor*, 109 S. Ct. 1865, 1871-72 (1989); *Titran v. Ackman*, 893 F.2d 145, 147 (7th Cir. 1990). Count 1 will not be dismissed.

Counts 7 and 11 against the City are § 1983 claims alleging that the City is responsible for the failure to promptly bring plaintiff before a judge or magistrate after his arrest. It is alleged that plaintiff remained in a hospital in the custody of the City from the day of his arrest on March 15 until he was transferred to the County Jail on March 20. In Count 7, it is alleged that the City has a policy of not bringing hospitalized arrestees before a judge. Count 11 charges a failure to bring him before a judge from the time plaintiff was transferred to the County Jail until April 15. In that count it is alleged that the City, Sheriff, and State's Attorney fail to have a "coordinated official policy" to ensure that arrestees are promptly brought before a judge.

Except for alleging that he himself was not present before the judge who determined that there was probable cause to detain him, plaintiff does not claim any other deficiency with the March 16 proceeding. Also, plaintiff does not allege that probable cause to arrest him did not exist. Furthermore, the determination of the existence of probable cause was made within 48 hours of plaintiff's arrest and no facts are alleged to overcome the presumption that the determination was therefore made within a prompt period of time. *See County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1670 (1991). The only question the allegations raise regarding the propriety of the probable cause determination is the question of whether it was necessary for plaintiff to be present during the proceeding.

Ideally, no person would be arrested without a judicially approved warrant being issued prior to the arrest.

See Gerstein v. Pugh, 420 U.S. 103, 113 (1975). As a practical matter, though, many arrests must be made without a warrant. Just as an arrest warrant is not to be issued without a neutral and detached judicial officer first finding probable cause that a crime was committed, in the situation of a warrantless arrest, there must be a post-arrest determination by a neutral and detached judicial officer that probable cause exists that a crime was committed. *See id.* at 114. The post-arrest *Gerstein* probable cause hearing, therefore, should have no greater procedural requirements than that for issuing an arrest warrant. While a state or municipality is certainly free to provide full adversarial proceedings for post-arrest determinations of probable cause, the Constitution does not mandate such a proceeding. Therefore, it is not constitutionally required that the adversarial safeguards of counsel, confrontation, cross-examination, and compulsory process of witnesses be provided at *Gerstein* proceedings. *Id.* at 119-22. Just as the proceeding for issuing an arrest warrant need not be held in the presence of the arrestee, it is not constitutionally mandated that the arrestee be present at a *Gerstein* proceeding. *McLaughlin v. County of Riverside*, 888 F.2d 1276, 1279 (9th Cir. 1989), *vacated & remanded on other grounds*, 111 S. Ct. 1661 (1991). Even though he was not present at the proceeding, since a timely probable cause determination was made following plaintiff's arrest, his *Gerstein* claims must fail. Since plaintiff does not argue that any constitutional principle other

than that set forth in *Gerstein* and its progeny was violated by his one-month detention, no basis exists for his continuing to pursue Counts 7 and 11 against the City.[2]

Gall and the City also move to dismiss Counts 4 and 5. Count 4 is a claim for violation of the Illinois Constitution and Count 5 is a claim for the intentional infliction of mental suffering. Plaintiff makes no response to defendants' arguments as to these two counts. Since plaintiff fails to present any argument supporting that Counts 4 and 5 adequately state a claim under Illinois law, these counts will be dismissed.

IT IS THEREFORE ORDERED that defendants City of Chicago's and O'Malley's motions to dismiss are granted. Defendant Gall's and Cook County Department of Corrections' motions to dismiss are granted in part and denied in part. Counts 4, 5, 7 and 9 are dismissed. Count 11 is dismissed as against defendants Department of Corrections, O'Malley, and City of Chicago. Defendant Sheriff of Cook County in his official capacity is substituted for defendant Department of Corrections on Counts 6 and 8. Defendants O'Malley and Department of Corrections are dismissed from this case. Defendants' motion for

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[2] The same ruling would appear to be applicable to the federal claims against the Sheriff and English. Those parties, however, have not yet moved to dismiss the claims against them so any ruling as to the claims against them will await an appropriate motion. It is also noted that despite the dismissal of the federal claims against the City, this court still has supplemental jurisdiction over the state law claims against the City in that the state law assault and battery claim arises from the same occurrence as the excessive force claim and a recent statutory change permits pendent party jurisdiction. *See* 28 U.S.C. § 1367(a).

sanctions is denied. Within two weeks, defendants Gall and City of Chicago shall answer the remaining counts against them.

ENTER:

William T. Hart
UNITED STATES DISTRICT JUDGE

Dated: DECEMBER 23, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RAFAEL GARCIA,	)	
Plaintiff,	)	
v.	)	No. 91 C 5535
CITY OF CHICAGO, et. al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

In an order dated December 23, 1991, certain of plaintiff's claims were dismissed, including all the claims against defendants O'Malley and the Department of Corrections. It is also noted in that order that it appeared the claims against defendants English and Sheriff Sheahan should be dismissed, but that issue had not yet been presented to the court. See December 23 Order at 7 n.2. When the order was distributed on December 23, substitute counsel appeared for plaintiff so the court did not then resolve the issue of the viability of the claims against English and Sheahan. The motion for summary judgment by those defendants was entered and continued and substitute counsel was told to inform plaintiff's counsel that he should consider whether he wished to continue to pursue the claims against those two defendants. On January 2 and 3, 1992, plaintiff filed motions to reconsider the December 23 Order, for leave to file a second amended complaint, and for entry of a preliminary injunction. Those motions were taken under advisement and are pending.

The motion for reconsideration is denied. For the reasons set forth in the December 23 Order, the hearing required by *Gerstein v. Pugh*, 420 U.S. 103 (1975), does not have to be conducted with the defendant present.[1]

Plaintiff seeks to file a second amended complaint continuing to bring *Gerstein* claims against all the defendants named in the first amended complaint except Gall and the Department of Corrections. Plaintiff also seeks to bring his claim as a class action seeking injunctive relief. As held in the December 23 Order, plaintiff has no viable *Gerstein* claim. Also, Garcia has no standing to bring a claim for injunctive relief because he is no longer incarcerated and was not incarcerated at the time he first filed the present action. This case, therefore, is unlike *County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1667 (1991), where the plaintiffs had standing because they were still incarcerated and had not yet had a *Gerstein* hearing at the time they first filed their complaint.

In the second amended complaint, plaintiff adds the additional allegation that he possessed a white, powdery substance at the time of his arrest. He further alleges that laboratory tests of that substance were not completed until March 26, 11 days after his arrest. The tests revealed the powder was not a controlled substance. It was not

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[1] Although plaintiff makes other arguments in his motion for reconsideration, they are actually arguments in support of permitting the filing of the second amended complaint and will be considered in that context. Unlike the *Gerstein* issue, the additional arguments relate only to factual allegations in the second amended complaint, not issues raised by the facts alleged in the first amended complaint.

until April 10, however, that the charges against plaintiff were dismissed. On April 12, a court order granting withdrawal of the probation violation petition was granted. Plaintiff was not released until April 15. The continued incarcertion of plaintiff could possibly constitute a due process violation. *Cf. Sample v. Diecks*, 885 F.2d 1099, 1114-16 (3d Cir. 1989). Plaintiff, however, argues only that *Gerstein* was violated and that false arrest and false imprisonment occurred in violation of the Fourth and Fourteenth Amendments. As previously discussed, no *Gerstein* violation is stated. Since, as discussed below, there was probable cause to arrest, there can be no false arrest claim or a related false imprisonment claim. *See Mark v. Furay*, 769 F.2d 1266, 1268-69 (7th Cir. 1985). Also, the factual allegations of the proposed amended complaint are unclear as to who can be held responsible for any improperly excessive detention that may have occurred. *Compare Diecks*, 885 F.2d at 1117-19. On the present legal arguments and given the present proposed amended complaint, leave to amend will not be granted.

Plaintiff argues that the proposed second amended complaint states a claim for arrest without probable cause. Plaintiff, however, alleges that defendant Gall found a plastic envelope with a white, powdery substance at plaintiff's feet. Although it was later discovered that the powder was not a controlled substance, that was not known at the time of plaintiff's arrest. The allegations support that Gall had probable cause to arrest plaintiff. The second amended complaint does not state a sufficient claim for arrest without probable cause.

Finally, plaintiff makes no argument supporting the continued vitality of the first amended compliant claims

against defendants Sheahan and English. The claims against those defendants will be dismissed consistent with the December 23 ruling on the *Gerstein* claims. The motion for summary judgment is denied as moot.

IT IS THEREFORE ORDERED that plaintiff's motions for reconsideration, for leave to file a second amended complaint, and for a preliminary injunction are denied. Counts 2, 6, 8, 10, and 11 of the First Amended Complaint are dismissed. Defendants English and Sheahan in their individual and official capacities are dismissed from this case. Defendants English's and Sheahan's motion for summary judgment is denied without prejudice as moot. All discovery shall be completed by March 27, 1992. Status hearing set for January 30, 1992 at 9:15 a.m.

ENTER:

William T. Hart
UNITED STATES DISTRICT JUDGE

Dated: JANUARY 15, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RAFAEL GARCIA, Plaintiff,	)	
v.	)	No. 91 C 5535
CITY OF CHICAGO, et. al., Defendants.	)	

MEMORANDUM OPINION AND ORDER

In his Third Amended Complaint, plaintiff Rafael Garcia alleges various constitutional claims against defendants City of Chicago and Anna Gall, a Chicago police officer. Count I is an excessive force claim against Gall. Count II is a false arrest claim against Gall in which it is alleged that she "dropped" or planted a bag of white powder in front of plaintiff so as to charge him with possession of cocaine. Count III is a false arrest claim against Gall alleging that she failed to submit the white powder to any test; she did not taste or smell it, nor did she use a Cobalt Thiocyanate Spot Test ("Cobalt Test"). Count IV is an excessive detention claim against Gall in which it is claimed that Gall would have known that her false arrest would cause plaintiff to be detained for the substantial period of time it would take to test the white powder that Gall knew or should have known was not cocaine. Count V is a claim against the City for having a custom or policy of not providing the Cobalt Test to district police officers so that officers can know within 90

minutes whether a substance is cocaine. Count VI overlaps with Count V, but is directed at existing police laboratory testing of cocaine being deficient in that it takes too long a period of time to determine if seized substances are cocaine. Defendants have moved to dismiss Counts III through VI. On a motion to dismiss, all the well-pleaded allegations of the complaint are assumed to be true and all reasonable inferences are drawn in favor of the plaintiff. *Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1039 (7th Cir. 1987).

In Count III, it is alleged that Gall found a bag of white powder at Garcia's feet. For purposes of Count III, it is assumed that Garcia had possessed the powder, unlike Count II where it is alleged Gall placed the powder in Garcia's possession. Garcia alleges that Gall relied on "the size, shape and appearance of the white powder contents of the bag and the size and shape of the bag itself" in determining that it contained cocaine. Garcia contends that, absent further testing such as taste, smell, or a Cobalt Test, probable cause to arrest him did not exist.[1]

Unless it is clearly established that a police officer cannot rely on size, shape, and appearance of a bag and the white powder inside it to determine there is probable

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[1] Plaintiff does not allege the facts that led up to his being stopped by Gall. There are no allegations that Gall had an insufficient basis for initially stopping Garcia. On the other hand, there are also no allegations that support Gall had any reason other than the bag of white powder for suspecting that Garcia possessed a controlled substance. However, it is alleged that 80 to 90 percent of Gall's past narcotics arrests had been for cocaine.

cause the powder is controlled substance, Gall would be qualifiedly immune from any claim for damages against her. *See generally Williams v. Anderson*, 959 F.2d 1411, 1414 (7th Cir. 1992); *Auriemma v. Rice*, 910 F.2d 1449 (7th Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 2796 (1991). Not only is there no case law clearly establishing that Gall lacked probable cause under the facts alleged in Count III, there are cases to the contrary, supporting that the facts alleged in Count III constitute probable cause for concluding the bag contained cocaine and thus there would be probable cause to arrest the person who possessed the bag. *See United States v. Potter*, 895 F.2d 1231, 1234 n.1 (9th Cir.), *cert. denied*, 110 S. Ct. 3247 (1990); *United States v. Campbell*, 843 F.2d 1089, 1095 (8th Cir. 1988); *United States v. Miller*, 769 F.2d 554, 557 (9th Cir. 1985); *United States v. Vasquez*, 638 F.2d 507, 525 (2d Cir. 1980), *cert. denied*, 450 U.S. 970, 454 U.S. 847, 975 (1981); *United States v. Rosario*, 638 F.2d 460, 462 (2d Cir. 1980), *cert. denied*, 450 U.S. 1000 (1981); *United States v. Vasquez*, 634 F.2d 41, 43 (2d Cir. 1980). *See also Texas v. Brown*, 460 U.S. 730, 742 (1983) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)) ("[P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief' that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false."). Count III will be dismissed since the facts alleged support that Gall had probable cause to arrest Garcia.

In Count IV it is alleged that Gall is liable to Garcia for the injury of being held in custody for almost a

month. This should not be stated as a separate count, but instead simply states one form of damages that may have resulted from the false arrest alleged in Count II. Count IV will be dismissed, but without prejudice to claiming the injury of detention as part of the damages for Count II. It will not presently be determined whether such damages may properly be considered to be recoverable as being proximately caused by the false arrest alleged in Count II. Gall asserts that she was not responsible for Garcia's continued detention. While it is true, under the facts alleged, that Garcia was actually in the custody of others, those others would have relied on Garcia being reported to have been in possession of a white powder. Whether that is a sufficient causal connection is not adequately addressed by the parties and therefore a claim for such damages will not be dismissed on the present motion, but will be considered part of the claim for damages set forth in Count II.

In Count V, it is alleged that the City is liable to Garcia because it has a policy of not providing each of its police districts with an "inexpensive and practical" field test kit which would test for cocaine and some other controlled substances and produce results within 90 minutes. Having Cobalt Test kits available in each police district may or may not be a wise policy for the Chicago Police Department to follow. The question for this court, however, is whether such a policy is mandated by the Constitution. As the Seventh Circuit has stated:

> [T]he Constitution does not require police to follow the best recommended practices. There is a gap, often a wide one, between the wise and the compulsory. To collapse those two concepts

> is to put the judicial branch in general superintendence of the daily operation of government, which neither the fourth amendment nor any other part of the Constitution contemplates.

Gramenos v. Jewel Cos., 797 F.2d 432, 442 (7th Cir. 1986), *cert. denied*, 481 U.S. 1028 (1987).

Neither the allegations of the complaint nor the arguments of plaintiff are sufficient to support a holding that the Constitution mandates that the Chicago Police Department provide Cobalt Test kits for all of its district police stations. Count V will be dismissed.

In Count VI, plaintiff complains that the City's laboratory procedures for testing seizures believed to be cocaine is insufficient in that the City takes too long a period of time to conduct the tests. In Garcia's case, it is alleged that it was 11 days after his March 15, 1991 arrest before it was determined that the white powder he had allegedly possessed was not cocaine.[2] As regards a policy or custom of the City, it is alleged that the Cobalt Test is never used and that all testing for cocaine is done at a central laboratory. It is alleged that testing for cocaine commonly takes 10 to 20 days for the Police Department

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[2] It is also alleged that the drug charges against Garcia were not dismissed until April 10, 15 days after laboratory results showed the substance he allegedly possessed was not cocaine. On April 12, a petition for revocation of his probation, which was based on the alleged possession of cocaine, was also dismissed. Garcia was not released from jail until April 15. Nothing is alleged as to what happened between March 26 (the day of the results) and April 10 (the date charges were dismissed). There is no direct allegation of a delay in communicating the results of the test.

laboratory to accomplish. It is further alleged that no attempt is made to separate out for quicker processing substances seized from persons who are being held in custody pending trial nor is any attempt made to expedite communication of negative test results. It is also alleged that "delays in the testing and in the communication of the test results in the case of the Plaintiff were not an isolated instance but were fairly typical of the delays in the submission of the suspected substances submitted for testing to the central laboratory." Other than Garcia's one experience, there are no allegations of any specific instance of either delays in test results or of any person being incarcerated awaiting delayed negative results.

Conduct that results in unreasonable, unnecessary, and unjustified delays in processing and releasing arrestees violates the Constitution if done intentionally or with deliberate indifference to the rights of the arrestees. *See Sivard v. Pulaski County*, 959 F.2d 662 (7th Cir. 1992); *Hood v. City of Chicago*, 927 F.2d 312 (7th Cir. 1991). On the motion to dismiss, it must be assumed that 10 to 20 days is an unreasonable amount of time to determine whether a substance is cocaine.[3] The city argues, however, that

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[3] Whether any such delays that may have occurred at the Chicago Police laboratory are unreasonable or unjustified would be a question of fact requiring inquiry into the nature of available test procedures and other factors. Among the other factors would be the question of reliability or unreliability of less formal tests for cocaine, such as visual inspection. For example, if a high percentage of the police seizures believed to be cocaine actually are cocaine, then there is less of a need for quick confirmation by laboratory tests. How often powders or other substances are misidentified as cocaine, how often this results in unnecessary detentions, and the knowledge of Police

Garcia has failed to allege adequately the existence of any municipal policy or custom. The City cannot be held liable unless a policy or custom of the City caused plaintiff to suffer constitutional injury. *See Sivard*, 959 F.2d at 668.

Alleging an adequate claim against a municipality requires greater specificity than the ordinary pleading standard applicable under the Federal Rules of Civil Procedure. *Id.* at 667. Boilerplate or conclusory allegations of a municipal policy or custom will not suffice. *Id.* at 667 n.14; *Strauss v. City of Chicago*, 760 F.2d 765, 767 (7th Cir. 1985). The allegation of a single incident of unconstitutional conduct by a municipal employee along with a conclusory allegation of a policy or custom is not sufficient to establish municipal liability. *Id.* Ordinarily, more than one instance of unconstitutional conduct must be specifically alleged. *Id.* at 769; *Hossman v. Blunk*, 784 F.2d 793, 797 (7th Cir. 1986). Allegations of multiple specific incidents, however, are not the only means of factually supporting a municipal policy or custom claim. *See Strauss*, 760 F.2d at 760 F.2d at 769 (a "plaintiff must plead some fact or facts tending to support his allegation that a municipal policy or custom exists that could have caused his injury"). A single incident supported by detailed and specific allegations of the nature of the policy or custom, *see Ruehman v. Village of Palos Park*, 1992 WL 170565 at *7-8 (N.D. Ill. July 16, 1992), or sufficient facts that lead to a conclusion that an official policy or custom must have caused the single incident alleged, *see Sivard*, 959 F.2d at

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officials as to such occurrence are all factors to be considered in determining if the City acted with deliberate indifference.

668-69; *Murray v. City of Chicago*, 634 F.2d 365, 366-67 (7th Cir. 1980), *cert. dismissed*, 456 U.S. 604 (1982), can also support claims against a municipality.

Plaintiff's complaint, however, does not contain detailed allegations of the functionings of the police laboratory. *Compare Ruehman, supra* (detailed allegations as to procedures used by the Circuit Clerk, County Sheriff, Illinois State Police, and various municipal police departments to report the quashing of warrants on computerized networks, including identification of specific deficiencies in the procedures that resulted in quashed warrants not being removed from the computer networks). While Garcia generally alleges that delays in testing substances exist, there are no allegations as to specific procedures employed at the police laboratory. Also, this is not a situation like *Sivard*, where the existence of a municipal policy or custom can be presumed. Additionally, unlike *Sivard*, which was a ruling on a motion for summary judgment, there are no admitted facts of the defendant that lend support to the existence of a municipal policy or custom claim of intentional or indifferent delay. *See Sivard*, 959 F.2d at 668-69. Count VI will be dismissed.

IT IS THEREFORE ORDERED that defendants' motion to dismiss Counts III through VI is granted. Counts III, IV, V and VI of plaintiff's third amended complaint are dismissed. Defendant City of Chicago is dismissed from this case. Ruling date of August 13, 1992, is stricken. Remaining parties shall file an original and

copy of their proposed pretrial order in open court on September 10, 1992 at 9:15 a.m.

ENTER:

William T. Hart
UNITED STATES DISTRICT JUDGE

Dated: AUGUST 7, 1992